86-788

No._____

Supreme Court, U.S.
FILED
OCT 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October TERM, 1986

ALABAMA POWER COMPANY,
a corporation.

Respondent

v.

1354.02 ACRES, MORE OR LESS,
OF LAND IN RANDOLPH COUNTY,
ALABAMA, and Gladys Graves, et al.
Robert A. Perry

Petitioner

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES 11th
CIRCUIT COURT OF APPEALS

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Does due process clause of the V and XIV Amendment of U.S. Constitution require that the Court of Appeals address all issues presented for review? Does due process clause require a lower court to abide by and enforce the ruling of the higher court? Does just compensation clause of V Amendment, upon condemning of property, require that property owner be paid for damages, property and all rights taken? Is the due process clause violated, after a ruling in the Court of Appeals, and when the lower Court refuses or fails to comply with that ruling, and when a second Appeals Court on the same level as the first Appeals Court changes the ruling of the first Appeals Court? In eminent domain proceeding is due process including proper instruction and just compensation a requirement of the U.S. Constitution or a requirement of 16 USC 814,or a requirement of U.S. v. Merz?

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The Eleventh Circuit Court of appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same issue, had rendered an opinion in conflict with Alabama Supreme Court, has upheld an opinion and judgement of District Court which reverses another Eleventh Circuit Court of Appeals decision on the same matter, has refused to review the issues on appeal, has made an opinion which marks a departure from reasoned analysis. It announces a rule which fails to protect the values protected by the 5th and 14th amendments of the United States Constitution, it sanctions the improper actions of District Court on the issues of instruction to commission in confilict with U.S. Supreme Court. Appeals Court never examined the possibility of prejudice which the errors complained of might have affected thereby establishing clearly erroneous conclusions.

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PETITION FOR WRIT OF CERTIORARI

Robert A. Perry respectfully prays that this Court issue, a Writ of certiorari to review the judgment and opinion entered by the 11th Circuit Court of Appeals in Alabama Power Company v. 1354.02 acres, more or less, of land in Randolph County, Alabama and Gladys Graves, et al. Defendant, Robert A. Perry No. 85 - 7146 (May 30, 1986).

OPINIONS BELOW

The opinions of the 11th Circuit Court of Appeals affirming in part, reversing in part and remanding this case is reported at 709, F2d 666, dated July 11, 1983 and is in the appendix The judgment and opinion of District Court, dated January 15, 1985, granting no relief as required by reversal, Civil Action No. 78-213-E is included in appendix The opinion of the 11th Circuit Court of Appeals affirming the action of District Court and commission on remand is Case No. 85-7146,dated May 30, 1986 and is not published but is included in appendix

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254 and the V and XIV Amendments of The U.S.Constitution. Property was condemned under eminent domain as authorized by Federal Power Act Sec 21, 41 Stat. 1074, 16 USCA § 814. The opinion of the 11th Circuit Court of Appeals was entered May 30, 1986. It denied a timely petition for rehearing and suggestion for hearing en banc July 29, 1986. This petition for writ of certiorari was filed within

the 90 day period as prescribed by Rule 20 as time is computed by Rule 28 and Rule 29.

CONSTITUTIONAL PROVISIONS INVOLVED

The resolution of the question presented in this case involves the due process clause of the V and XIV Amendment and the just compensation clause of the V Amendment of the United States Constitution.

United States Constitution, Amendment V provides in pertinent part: ---nor shall any person--- be deprived of life, liberty, or property without due process of law: nor shall private property be taken for public use, without just compensation.

United States Constitution Amendment XIV provides in pertinent part: section 1---Nor shall any state deprive any person of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

A. Summary of Facts

Robert A. Perry owned a 188 acre cattle farm until Alabama Power condemned in 1978 and took 15,71 acres of it along with the entire riparian rights, the entire southern edge, and part of the eastern and western edge of this property containing a strip about 15,000 feet long consisting of fences, raw land, riparian rights, minerals, timber, access roads to the main body of land and access roads to a section of the property that was severed by water in the after condition. Property was completely fenced and used continually for pasture until Alabama Power Company destroyed the fences in 1979.

Part of the boundary of property was joined by Alabama Power. Boundary line was the 790 foot elevation contour. On part of the southern boundary Alabama Power did not own to the 790 foot contour. Along this southeastern section of the property, the center of Wedowee Creek was the property line for about 1500 feet. Alabama Power Company had purchased to the 790 foot contour in 1928. In its deed from Bunt Hood to Alabama Power Company, (1928), Mr. Hood gave an erroneous description of lands now owned by Perry when he sold the property below the 790 foot contour to Alabama Power. This deed was in error because Mr. Hood never owned all the property deeded to Alabama Power . The section not owned but erroneously deeded to Alabama Power is the 1500 feet of property owned by Perry that was bordered by the canter line of Wedowee Creek.

In about 1942, Alabama Power marked the 790 foot contour line along the line between Perry and Alabama Power. They did not stop the marked line at the end of their actual owned land but continued with the line to include all land in the erroneous deed from Bunt Hood. They maintained that line by keeping it painted. At that time, Perry pointed out the error to Alabama Power and assumed the error would be corrected after an exchange of letters. Perry had fenced the property, was using and continued using it. Even though Alabama Power did not own to the 790 foot contour along all this property there now exists a blazed and marked red line on the 790 foot contour along the Perry, Alabama Power land line but also across Perry land on which section Perry owns above and below the marked 790 foot contour line. Said line

does not denote a land line as believed by Alabama Power but simply marks the 790 foot contour across Perry's land. During the time of appraisal by Alabama Power it came to the attention of Perry that Alabama Power was using erroneous maps, assuming the marked 790 foot contour to be the correct line between Perry and Alabama Power. Perry attempted to get these maps corrected. Alabama Power responded that their maps were correct and enclosed their erroneous deed from Bunt Hood to the property along with a written statement (DX5A, June 15, 1978) showing that they had appraised and cruised only 9.76 acres of land. The correct acreage taken is 15.71 acres of land and timber. Maps were finally corrected on August 10,1978 but this was after Alabama Power had made its one and only cruise and appraisal of property. During the 1981 commission hearing, the Commission and District Court refused to allow testimony of erroneous maps. Alabama Power Appraiser stated before Commission the times he was on the property and appraised the property to be Sept. 1976. Mr. White testified that he made only one cruise of the timber and that was in July 1978. He stated he cruised 9.6 acres, used maps from Alabama Power. All testimony confirmed the use of the incorrect maps, which would not have included the fences, one road, part of the timber, minerals, part of the land and the riparian rights. Alabama Power appraiser also falsified the length and cost of replacement road that he appraised. He stated it to be 1200 feet long. He established his price with replacement cost. He also stated repeatedly that he allowed nothing for taking the riparian rights. (Tr191-192-193-194), stated that

he did not appraise minerals. Alabama Power established its raw land price by the use of low grade pure timber land comparable sales in spite of their stated highest and best use to be pasture. The comparable sales were not comparable to condemned land. The instruction to Commission included no instruction on how to appraise in the absence of sales comparables in every way; none at all on the means of appraising minerals, best evidence of value, burden of proof; the words RIPARIAN RIGHTS are not mentioned.

Commission and District Court accepted Alabama Power appraisal,even though it was admitted to be a partial appraisal and in spite of clear instruction that property must be valued as a whole and appraisal is required before condemnation. Commission totally ignored Perry's proper appraisal. District Court failed to properly instruct and falsified reasons for not paying for minerals. District Judge made a false statement by attributing statements to a Power Company mineral expert. He also falsified a statement of land value attributed to Perry when he stated that Perry land value was $10,000.00. On appeal to the 11th Circuit Court of Appeals (1982), Perry pointed out the failure of District Court to allow map correctness testimony. Perry showed the erroneous maps used by Alabama Power and the relation of the map used by Alabama Power appraiser and the actual date of appraisal by this appraiser. The same applies to the cruising or appraising of timber. The Court of Appeals agreed with Perry and rejected Alabama Power's argument. The Appeals Court found that District Courts failure to allow Perry an opportunity to prove his point on the issue of maps used and

land left off maps was a "clear error of law". This same error will be repeated by District Court in 1984 and affirmed by appeals court in 1986 after appeal.

The Court of Appeals reduced this issue of appraisal to one fact in its remand: Land owner must be allowed to prove his point. District Court refused to allow the reversal and remand from the 11th Circuit to be used by Commission on remand. District Court's instruction did not state findings and remedy as prescribed by 11th Circuit. Perry attempted three times to get District Court to properly instruct. Perry objected and complained that this part of the reversal consisted of two issues. The correctness of maps on the separate dates and separate action of both the appraiser of land and cruiser of timber. The specific issue stated by 11th Circuit to be all important was never shown to or instructed to Commission. These were the issues on appraisal on remand that should be determined but were not because of instruction. Were the maps correct at the date of timber cruise? If not the timber cruise was wrong. Were maps correct on date of land appraisal? If not the appraisal was wrong. Was there additional land left off maps after August 1978 correction of maps? There was also the riparian rights issue which was addressed by reversal (1983). Reversal states District Court was in error for assuming that riparian rights were included in total value found by commission because the witness whose testimony was generally accepted by Commission had not discussed or disclosed the value of riparian rights. Appeals Court asked for the disclosure and payment for this specific value of riparian rights that was not included in Alabama

Power testimony of total value as accepted by Commission. Instruction never states this and Perry objected and requested proper instruction three times to no avail.

In the interval between reversal and second Commission hearing, while Perry was attempting to no avail to get proper instruction, District Court asked Perry, in show cause, for values of riparian rights, and timber left off maps, before correction and value of so called pressed down land left off maps, after correction.

On hearing of remand before Commission, which is held with improper and objected to instruction, Commission limits already erroneous instruction even more when they limit appraisal issue to be a timber appraisal issue only (3 Tr 5) at which time Perry objected. There was never any doubt that Alabama Power stated that they appraised 15.71 acres but the court of Appeals (1983) has made the issue to be not what Alabama Power said it appraised but what it actually appraised based on when appraisal took place,was the map correct on that date? If not Appeals Court finds that appraisal was wrong, irrespective of what Alabama Power says it appraised.

On riparian issue Commission states its predetermined finding and reason for not paying for riparian rights. That false statement follows:

> Mr. Chairman : "and with respect to Item number one, we are of the opinion that we had considered riparian rights in estimating the value of land. However our opinion was based on the fact that Mr. Moss had testified to the value and gave consideration to the riparian rights value at that time. Now we would like to reinforce our consideration of that by having Mr. Moss re-testify if he gave any value or any special value, exceptional value or

any value included in his testimony for riparian rights." (3 Tr 13).

Perry objected and showed Commission that Moss stated he allowed nothing for riparian rights. (3 Tr 15-16). Perry objected to instruction (3 Tr 15-16). Perry objected to instruction (3 Tr 18). Moss states that he included value of riparian rights in appraisal, Perry objected because Moss's previous testimony stated that he allowed nothing for riparian rights (3 Tr 23-24-25-26). Numerous objections followed the contradictory testimony of Moss, saying he included riparian rights in value at 1981 hearing,based on the whole and total testimony to the contrary at the earlier Commission hearing (1981). Moss's testimony that he allowed nothing for riparian rights was given at the same time of his testimony of total value which was accepted by Commission. (3 Tr 31-32-33). Commission at this point ruled that Moss had included riparian value in values at 1981 Commission hearing. Perry strenuously objected, showing testimony totally to the contrary (3 Tr 40-41-42-43-44), and showed Moss's testimony to be pure contradiction. Appealed but affirmed.

On Issue number two, Perry proved that he owned so called pressed down land by deed, survey and by possession. Alabama Power owned next to it but never exercised any ownership over the property, Perry harvested timber on it but Alabama Power stopped at the line of property at any time it made timber sale. (3 Tr 46, 3 Tr 143). Perry proved value by method prescribed by Court of Appeals (1983) to be (3 Tr 127-130 through135). Perry showed that Alabama Power artificially lowered the isthmus so that now the land is

surrounded by the 790 ft. contour but this was not true in 1976. Commission found that Perry never owned. It was appealed to Court of Appeals (1986),it refused to address issue.

On Issue number Three "Appraisal of less acreage than actually at issue", which was interpreted by District Court and Commission to be a timber appraisal issue only. This instruction is wrong and objected to. Commission contended they are not bound by reversal but by Judge Varner. (3 Tr 155-156). A large number of pages were wasted to try to show that the Court of Appeals had said that both land appraisal and timber appraisal or cruise was at issue. Each time as the actual words and logic of the reversal would prevail, then Alabama Power and Commission would state that only Judge Varner's instruction meant anything and the reversal was meaningless to them. They never would admit that appraisal was larger that simply stating we paid $300.00 per acre for 15.71 acres and that appraisal involves land together with fences, access roads, highest and best use as well as does the highest and best use actually change when the property is considered in its entirety. Perry showed Commission that Moss, the appraiser and White, the cruiser only appraised 9.76 acres as was the amount on (DX 5A) (3 TR 186), a written offer from Alabama Power dated June 15, 1978. Alabama Power stipulates that maps were in error until correction date August 1978. Moss appraised in September 1976 (3 Tr 163-168). Area not appraised had $16,000.00 worth of fences on it (3 Tr 179). Perry showed John White cruised 9.6 acres by referring to (3 Tr 176) (Tr 174). Acreage

corrected just before condemnation but not re appraised. (3 Tr 183-184). Improvements are not considered (3 Tr 184). Change dates on maps to verify map corrections shown. (3 Tr 191-192). Amount of timber per acre on land left off maps shown (3 Tr 127, 130 through135). Alabama Power testified in direct contradiction to previous testimony that they knew about map changes before White cruised. And that because the condemnation stated 15.71 acres taken that means it was appraised.

All this falsifying and all this effort was wasted because the District Court refused to instruct according to the reversal.

On re-hearing before District Judge, which was only partially recorded, he affirms that Commission included value or riparian rights, evan though all testimony at first hearing was to the contrary, as was the finding of the reversal. He had refused to instruct according to the reversal. He restated his position that land appraisal was not in reversal and made no finding. He reversed the majority of Commission when they awarded extra compensation for timber. He did not discuss or analyse the testimony in light of proper instruction.

He took timber because his Commission had made an error. Not that Perry failed to prove every thing and more as required by reversal.

On appeal back to 11th Circuit, that Court did not address the important issue of instruction, bias of Commission and District Judge, issue of eroded or pressed down land and the issue of land not appraised because the maps used by appraiser was incorrect until August 1978, that was clearly reversed and remanded but never addressed by District Court.

The 11th Circuit.1986, did not address riparian issue in light of proper instruction, previous appeals finding and reversal and in so stating that the value specifically asked for by pervious court was not necessary to disclose, thus reverses a previous Court on the same issue. The Appeals Court did not review timber issue in light of finding of previous reversal, evidence from 1981 Commission hearing, and proper instruction to Commission on remand.

B. PROCEDURAL HISTORY: Raising and Preserving of Question.

November 14, 1978, Alabama Power condemned under eminent domain as authorized by Federal Power Act. Sec 21, 41 Stat. 1074, 16 USCA S 814. Perry answered complaint 12-11-78 and gave 28 reasons why "Just compensation" was not paid. Asked for a Jury Trial 3-1-80. District Judge never denied but referred to Commission without instructing according to Issues raised in "answer", Commission report made 1-13-82, Perry petitioned for review with exceptions to Commission report and demanded Jury Trial 1-29-82, granted hearing 8-12-82, denied rehearing 10-1-82, Perry appealed to 11th Circuit Court of Appeals 11-3-82 based on not just compensation, which upheld in part, reversed in part and remanded 7-11-83. Perry's Brief of Errors, Biased Rulings and statements by Commission and Honorable Judge along with instruction not followed and additional instructions needed (not acknowledged) 12-1-83. Perry objection to court Letter of 12-12-83 and request for supplementary instruction and enlargement of issues to be considered. (not acknowledged 1-3-84). Order of show cause

asking Perry for value of riparian rights in footage and value per foot, value of timber not appraised and value of pressed down land 1-13-84. Order stated 1-26-84--Order correcting typographical error 3-9-84--Order to answer Show Cause 3-20-84. Perry's answer to Show Cause 4-6-84 showing just compensation. Order of Remand to Commission 4-18-84. Perry motion to set aside or amend order, order of remand and denial of motion for new Judge and Commission 4-30-84, denied 4-30-84. Perry motion to file interlocutory appeal to get proper instruction 5-9-84. Order denied 5-14-84 Report of Commission 8-26-84. Perry objections to Commission Report and petition for Review objecting to instruction and compensation 10-15-84. Hearing before Judge 1-2-85. Motion for rehearing 1-20-85. Denied 1-30-85. Perry reappealed to 11th Circuit Court of Appeals 2-14-85. Appeals Court affirms 5-30-86. A timely appeal for a rehearing and en banc consideration was filed. Denied 7-29-86.

This appeal was primarily an action to force District Court to abide by 7-11-83 reversal and remand by the 11th Circuit Court of appeals directing that Perry be paid just compensation for property and rights taken. District Court has failed to properly instruct. Instruction can be used as a tool to deny just compensation, just as it can be used to guarantee just compensation. District court has a long history, in this case, for using instruction in a biased way to in fact deny Perry "Just compensation" and due process as guaranteed in the U.S. Constitution.

Perry at every stage of the proceedings has objected based on just compensation and due process. Instruction by District

Court asks questions that are already findings of fact in the reversal.

REASONS FOR GRANTING WRIT

The Eleventh Circuit Court of appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same issue, has rendered an opinion in conflict with Alabama Supreme Court, has upheld an opinion and judgement of District Court which reverses another Eleventh Circuit Court of appeals decision on the same matter , has refused to review the issues on appeal, has made an opinion which marks a departure from reasoned analysis. It announces a rule which fails to protect the values protected by the 5th and 14th amendments of the United States Constitution, it sanctions the improper actions of District Court on the issues of instruction to commission in conflict with U.S.. Supreme Court. Appeals Court never examined the possibility of prejudice which the errors complained of might have affected thereby establishing clearly erroneous conclusions.

Perry appealed for the second tome to the court of appeals in 1985 attempting to get District court to abide by the 1983 reversal. This appeal consisted of six issues:

STATEMENT OF THE ISSUES

ISSUE I DISTRICT COURT FAILED TO AWARD ANYTHING FOR RIPARIAN RIGHTS.

ISSUE II DISTRICT COURT IS IN ERROR FOR NOT AWARDING ANY PAYMENT FOR SO CALLED PRESSED DOWN LAND.

ISSUE III DISTRICT COURT IS IN ERROR FOR NOT AWARDING PAYMENT FOR TIMBER NOT APPRAISED AND FOR NOT FOLLOWING THE MEANS AND METHOD FOR DETERMINING THIS ISSUE AS OUTLINED BY COURT OF APPEALS

ISSUE IV DISTRICT COURT FAILED TO ALLOW PERRY TO SHOW THAT NOT ALL LAND WAS APPRAISED AND FAILED TO MAKE ANY FINDING ON THIS ISSUE, THEREBY DEPRIVING PERRY OF JUST COMPENSATION.

ISSUE V DISTRICT COURT AND COMMISSION IS BIASED, THEREFORE DENYING PERRY JUST COMPENSATION FOR LAND TAKEN.

ISSUE VI DISTRICT COURT ERRED WHEN IT DID NOT GIVE PROPER INSTRUCTION.

The appeal Court on page one of its May 30,1986 opinion said:

> The appeal in this condemnation suit simply questions whether there is sufficient evidence to support District Court's determination that appellant property owner was adequately compensated for riparian rights and timber on condemned land. we affirm.

Court of Appeals (1986) totally misses the point. Appeal is from District Court's opinion and instruction and Commission's finding and conduct on remand after a reversal from the 1983 Court of Appeals. The 1986 Court of Appeals has not addressed the issues on appeal in the light of facts from the 1981 commission hearing and District Court, the reversal in 1983, the faulty instruction to commission on remand, the issues actually appealed or the fact that power company testimony was tainted at the 1984 commission

hearing according to the same witnesses previous sworn testimony. 1983 appeals court reversed and remanded to District court on four issues, yet District court refused to abide by this reversal, refused to award any compensation, and proceeded to improperly instruct and act in a biased manner to in effect reverse and circumvent the 1983 reversal.

Issue I. riparian rights: Appeals court 1983 found:

(2) District Court erred in assuming that the Commissioners who were appointed to determine compensation took the reparian value into account in assessing the total land value because the property assessor whose testimony generally was accepted by commissioners did not discuss the value of riparian rights (709 F 2d 666).

At 1981 Commission hearing, Moss the appraiser whose testimony was relied on stated that he allowed nothing for reparian rights (Tr 191,192,193,194).

Alabama Power Company v. 13543.02 acres, more or less, of land in Randolph County, Alabama and Gladys Graves, et al. 709 F 2d 666 (1983).

Compensation for Riparian Rights and Damages

Appellant claims in separate counts that he was denied compensation for riparian rights on the land taken, and denied compensation for damages to the remaining property. Appellee responds that "(t)he reason the disadvantages caused by the reservoir did not result in monetary award was because they were more than offset by the advantages. The commission...and the District Court... found enhancement to the remainder as a result of the reservoir." The Commission mentioned appellant's claim as to riparian rights, but made no finding. The District court assumed the riparian rights "must have been " considered in assessing the total value of the land. Because the commissioners may have been laboring under the same erroneous view of the law as that held by appellee's, however, this assumption was error.

Compensation for the taking pursuant to 16 U.S..C. s 814 is a question of federal law, which is resolved here by reference to Alabama law. See Georgia Power Co. V. Sanders, 617 F.2d 1112 (5th Cir.1980) (en banc). The Alabama Code clearly states that except in cases involving condemnation for highways or water conservancy projects, enhancement to the remaining land is not to be considered in determining "just compensation" for the land taken. section 18-1-18, Code of Alabama (1975). That provision has been construed, however, not to preclude consideration of enhancement of the remaining land to offset damage to the remaining land. Town of Eutaw V. Botnick, 150 Ala. 429, 43 S.739 (1907).

[2,3] In other words, there is a distinction made between the land taken and the land remaining. The property owner must receive "just compensation" for condemned property, without regard to any enhancement of the remaining land. Damage to remaining land, however , may be offset by enhancement in the value of that land. Appellant's claims for damages due to interference with watering rights, for example, clearly are damages to remaining property which, under the Town of Eutaw rationale, may be offset by any enhancement. That is not the case, however, with riparian rights. Once the land containing water and access to that water, is condemned the taking is complete. Those rights are akin to condemned real property. enhancement, therefore, may not be set off against riparian rights. As riparian rights fall on the "taking" side of the equation, denial of the rights must be compensated.

Instruction from District Court given to Commission on remand was objected to three times. The issue was not what District judge stated in his opinion, filed January 15,1985.

Instruction I. In assessing the total value of the land taken did you consider the value, if any, of riparian rights?

This instruction misses the point of the reversal. The reversal did not want to know if Commission considered the value (because appeals court had found that it did not) but instead it wanted value of riparian rights disclosed and added

to erroneous total value found by Commission at 1981 hearing. Commission found and District Court agreed in 1984, on remand, after receiving District Court's faulty instruction, that Moss had stated riparian value and included that value in total value (3Tr 13) and thus awarded nothing for rights taken. They never showed this testimony from 1981 hearing or disclosed the value, Perry objected and showed Moss testimony to the contrary. 1984 Commission hearing and Instruction was nothing more than a cover up. The 1983 reversal had clearly found that Moss had never disclosed or included riparian value in his total value accepted by Commission. The issue is not as appeals Court (1986) stated or as District Court(1984) instructed, but is an issue that the value of riparian rights has not been disclosed and paid for as directed by 1983 reversal. Instruction was not proper. Appeals Court 1983 carefully explained its finding of fact after stating that riparian value was not included in Commission and District Courts total value. It stated that Alabama Power stated that it did not pay for riparian rights because it was more than offset by advantages caused by the reservoir. Appeals court responded that this was an erroneous assumption of law because reparian rights fall within the taking, and anything taken can not be offset by enhancement but must be paid for. They stated that Alabama Power had testified before the Federal Power Commission that they expected to pay for riparian rights. The reversal remanded to ensure that the value of these rights are paid for. If this reversal was not soundly based on facts and law Alabama Power could have appealed in 1983. They did not and thus

the reversal's finding of fact and instruction become the basis for future litigation in this case. Facts from reversal are that riparian rights are not included in testimony from Moss, Alabama Power's high ranking employee, appraiser, and the man whose total value was accepted by Commission and District Court. The instruction should have been to now Determine value of reparian rights, disclose that value and add it to erroneous total value found by Commission and District Court in 1981-82. If Commission dared to attempt to reverse appeals court 1983,as it did, it would have had to show that included reparian value came from Perry, because it is fact that Moss did not include value or state it, only Perry did. After the clear finding of appeals Court in reversal,that Moss had not included riparian value in his total value, District Court, states that value came from Moss and is included in commission's total value from 1981. Appeals Court 1986 upholds that finding and states it is not necessary to disclose value of reparian value as required by reversal. We have clearly seen Commission and District Judge reverse the court above by using faulty instruction and another court of appeals affirming District Courts reversal of court above. 1984 Commissions restatement that their total value came from Moss in 1981 is a statement that they offset riparian value with enhancement illegally, because the reversal had found that Moss's total value did not include riparian value because Alabama Power had offset that value with enhancement. In other words logically speaking, Commission accepts Moss's total value, found to not include riparian value because of enhancement offset by 1983 appeals

court. The very fact that Commission accepted its total value from Moss means that their total value also does not include riparian rights by virtue of the fact that Moss's total value did not include riparian value. These are facts and Commission can not say that they did not offset and Moss can not say he did not offset. Time for appealing those facts from 1983 reversal has long since passed. U.S.. V. Merz 84 S. Court. 639 (1964) states that first responsibility of District Court aside from appointment of competent Commissioners, is proper instruction. In this case instruction and the law comes from appeals court 1983 on reversal and remand. Also see 146 Ala. Court. 208,40 So 205 (1906)

Appeals Court 1986 states that it is not necessary to disclose value of reparian rights in this case. That is not true. This is one of those unique cases where by the exception to the unit rule applies.

Another panel of the 11th Circuit Court had reversed because value of riparian rights was not included in total value. They wanted to ensure that specific value is paid for. Moss's reason for having not included riparian value is not as important as his specifically stating he did not pay for reparian rights. He allowed nothing for reparian rights (Tr 191,192,193,194). See City of St. Louis V. Turner 331 Mo. 834, 55 S.W. 2d 942, p 944-945 (1932) see United Stated V. City of New York 165 F 2d 526, 528-529 (2nd Cir. 1948) This is a unique situation in which witness testified under oath that he had not paid for riparian rights and his total value was accepted by Commission. Various components of total value from Moss were established by different methods;

raw land by comparable sales, road by replacement costs, timber by cruise but he stated he allowed nothing for riparian rights. United States V. Corbin 423 F2d 821 (1970) p828.

> In order to comply with Merz supra the value arrived at had to be disclosed. Each component was arrived at by a different approach, therefore the aggregation of the values of the separate components seems to be the most logical manner of stating the ultimate award.

This 1986 appeals court and District Court opinion is in conflict with the 1983 panel from the same circuit on the same issue. Due process and just compensation is denied as guaranteed by United States Constitution. Please read Judge Hatchett's dissent in the 1986 opinion of the 11th Circuit. The dissenting opinion in the Court of Appeals decision states that the Court did not address all issues raised, and states that the case should be remanded once again to the lower court. Appeals Court (1986) completely ignores appealed issue II, issue IV which was not addressed in 1981 or 1984 by District Court and which was termed to be a clear error of law by 1983 appeals court, issue V, and the all important issue VI which dealt with instruction. This failure to address the issues clearly denies due process and just compensation.

District Court and Commission in their reports had failed to explain why they disregarded Moss's testimony at 1981 Commission hearing where he plainly stated he allowed nothing for riparian rights and now in a Conclusionary Statement says that riparian rights value is included in total value which was found by 1983 reversal to contain no riparian value

The Eleventh Circuit Court of Appeals remanded certain issues for proceedings not inconsistent with its decision. The

general issue is whether the proceedings in the lower court after remand were consistent with the Eleventh Circuit decision.

The dissent in the second Eleventh Circuit opinion of May 30, 1986 states that these lower court proceedings were not consistent with the earlier Eleventh Circuit ruling in that they failed to make findings on the issue of the value to be assigned to the riparian rights (p. 6 of opinion).

United States v. Merz, 376 U.S. 192, 11 L Ed 2d 629, 84 S Ct 639 (1964). The Supreme Court held in this case that reports of commissions were an insufficient basis for determining the issue of just compensation where the reports contained conclusory findings, and where the commissioners did not indicate the process or reasoning they used in deciding on a particular award.

U.S. v. 90.39 Acres of Land, 413 F Supp 91 (Dc Iowa 1976). The District Court held in this case that the report of land commissioners should not be accepted by the court where the commissioners failed to explain why they had rejected the Landowner's evidence of the effect the taking would have on business growth.

Appeals Court (1986) by stating the other part of its assumption of issue III to be "a sufficiency of evidence to support adequate compensation for timber", clearly again misses the point. District Court also states that this is a timber appraisal issue only on page 9 of its opinion. It is in error for not instructing according to 1983 reversal. The issues to be determined were: are maps correct at time of land appraisal and timber cruise, if not, added compensation was due Perry.

District Court states that land left off the maps (appeal issue IV) at the time of appraisal was not an issue and fails to make a finding on the issue (1984). Appeals Court 1986 refuses to review the issue on appeal and denies compensation and due process. The following excerpts from reversal address the action as two people doing two things. If this reversal only concerned itself with a timber appraisal, it would address it singularly, Excerpts showing dual action by two people (cruiser and appraiser) doing two things (appraising land and cruising or appraising timber) follows:

> The basis for this allegation is a claimed discrepancy between the actual property and the map utilized by Alabama Power to assess the amount of compensation and guide the cruiser---as to the two issues, concerning acreage (payment for timber and land) the court acknowledges --- the court determines that all the land was appraised "not clearly erroneous". We disagree.--- The timber cruiser and appraiser testified they appraised all the land as indicated on the maps. If the maps were incorrect however, their determination as to the proper amount of compensation would be incorrect as well. --- It was incumbent upon District court to hear his testimony and allow him to prove his point. Upholding determination of the commission as "not clearly erroneous" when they failed to provide appellant an opportunity to prove his point was a clear error of law.---We remand to provide appellant an opportunity to prove that Alabama Power appraised and cruised insufficient acreage and for what ever adjustment are necessary. (709 F 2 d 668-669).

After this discussion in reversal of the appraisal and cruise by the appraiser and cruiser, it is a cruel, unjust, unfair and a rediculous denial of just compensation for District Judge (affirmed by appeals court) to say that this is a timber appraisal issue only. Land was an issue as was timber and the

basis for added compensation was the issue of correctness of maps on the actual date of cruise and appraisal. District Judge is so personally biased because of being reversed by such a lowly person as Perry, that he will go to any means of discrediting that reversal, irregardless of what the law is or instruction should be or what reversal reverses.

Eminent Domain 186, 263

> In eminent domain proceeding, district court erred in upholding commissioners' determination that all of the land at issue was assayed, because property owner claimed that there was a discrepancy between the actual property and the map utilized by condemnor to assess the amount of compensation but commissioners declined to hear evidence concerning the validity of the survey maps; cause would be remanded to provide property owner and opportunity to prove that condemnor appraised insufficient acreage. (709 F 2d 667)

No reasonable person can construe this to be referring to a timber appraisal only, as District Court interprets it to be on page 9 of its January 15, 1985 opinion. Its refusal to make a finding on land appraisal or instruct properly on this and other issues is affirmed by1986 appeals court.

Wilson v. United States, 350 F 2d 901 (USCA 10th Cir 1965). This case states that where the instructions given, taken as a whole, are plainly in error a case must be reversed (p.908). The instructions being reviewed must be considered as a whole, not piecemeal or by taking parts of them out of context. The court in this case upheld the instructions given.

United States v. 125.07 Acres of Land, 667 F 2d 243 (USCA 1st Cir 1981) The court stated that the first responsibility of the district court, apart from the selection of responsible commissioners, is the careful instruction of them on the law, and if the Commission is given an erroneous

instruction, or no instruction at all, on a question of law which may have an impact on their determination of fair market value, their decision is tainted in the same manner as a jury verdict returned upon an erroneous instruction. The court vacated the award of compensation in this case because of lack of proper instruction as to the status of a certain road

District Court instruction did not ask for the specific finding of map correctness in its instruction and proceeded to circumvent the all important condition: If the map was wrong in September 1976,the date of appraisal, then Perry is due compensation for value components of land and improvements left off erroneous maps. If maps are wrong in June or July, 1978, the date of timber cruise, Perry is due added compensation for timber left off the maps at time of cruise. Without proper instruction Alabama Power presented tainted testimony at 1984 Commission hearing. They were providing wrong answers to wrong questions (instruction). Perry received nothing for land or timber not appraised because of faulty maps, due to instruction and bias. Alabama Power used erroneous maps showing that they were only taking 9.76 acres during appraisal in September 1976 and timber cruise in July 1978. Maps were corrected in August, 1978 to reflect the correct acreage (15.71) , but no reappraisal of land or cruise of timber was done by Alabama Power after maps were corrected. Appeals Court 1983 found that Alabama Power only appraised and cruised the land and timber that was shown on the erroneous maps in existence at time of appraisal September 1976 and at time of timber cruise in July, 1978.

They wanted District Court to award pay for land with Improvements and timber that was left off those maps until corrected in August, 1978. District Court did not so instruct or find. Appeals Court affirmed. Due Process and just compensation is denied Perry.

It Defies all logic that Alabama Power would survey the property they believed to be taken, draw survey maps and put those maps into the hands of appraiser and timber cruiser and than assume they did not use the maps to appraise the property by. Moss appraised the property in September 1976, the maps were corrected in August 1978 to reflect the correct acreage. Is there any logic involved in assuming that Moss did not follow the maps and looked into a crystal ball and knew to appraise the correct and larger amount of land. Is there any logic to support that Alabama Power cruised and appraised 15.71 acres of land and timber, when they presented Perry with a written statement June 15, 1978 (DX 5A) which states the acreage cruised and the acreage appraised to be 9.76 acres. After maps were corrected all parties and court agree that there were 15.71 acres land and timber taken. Is there any logic to assume that Alabama Power knew the maps were wrong in 1976 when they appraised and yet when asked to correct the maps in 1978 they responded with the erroneous deeds that supported their erroneous maps and affirmed in (DX 5A) that their maps were correct and that they had appraised and cruised 9.76 acres. Is there any logic to assume Alabama Power knew the maps wrong and yet waited two years to correct even though land was being appraised and cruised with the use of those

erroneous maps? Is there any logic to believe that Alabama Power cruised timber in July 1978 when in fact on June 15, 1978 Alabama Power presented Perry with a written statement of cruise, more than a month before cruiser claims he was on the property. Doesn't this show that Alabama Power is covering up the correct cruise date and falsifying it to try to assume they knew of map changes.

Perry presented a preponderance of evidence in addition to proving maps incorrect at date of appraisal and cruise. Appeals Court (1986) states Perry proved maps were incorrect. This was the condition stated by 1983 Court of Appeals, which would justify further compensation for land and timber. Court of Appeals still awards no compensation. Commission found that Perry was due added compensation for timber but District Court reversed and paid nothing. Statement that Commission misstated reason for granting payment and used the wrong standard does not preclude the fact that Perry met the burden of proof and exceeded it. It was Commission improperly reporting its findings not Perry's lack of evidence that is the problem. To take Perry's property without compensation because the Commission made an error is a violation of due process. Likewise to take under improper instruction also violates due process and just compensation.

United States v. 881.39 Acres of Land, 254 F Supp 294 (DC Okla 1966). In this case the court held that a court may not substitute its judgement for that of the commission and set aside awards merely because they might be different from those which the court might have fixed.

Conclusion: The 1986 Court of Appeals subtly yet significantly, misdirected it's analysis of this case to tainted testimony of the 1984 Commission hearing rather than to the testimony of the 1981 Commission hearing upon which the 1983 reversal was based along with that reversal. 1986 Court of Appeals reasoning is flawed because it does not clearly examine the previous facts (1981) and reversal along with proper instruction from 1983 reversal as compared with instruction of District Court on remand.

Court of Appeals (709 F 2d 666,1983) reversed District Court on four issues: (1) Since Commission and District court did not include the value of riparian rights in total value awarded in 1981, determine and disclose the value of riparian rights and pay Perry for them. (2,3) Alabama Power only appraised land and cruised timber that was on the maps as they existed at the date of appraisal and date of cruise irregardless of what Alabama Power said it appraised or cruised. If maps wrong on those dates make appropriate adjustments. (pay Perry added compensation). (4) Determine if another amount of land was left off maps after August 10, 1978 correction date. Pay Perry for it. Then Appeals Court (1983) said:

> Affirmed in part; reversed in part and remanded for further proceedings not inconsistent with this opinion. (709 F 2 d 669).

District Court, in spite of this clear order on remand has been any thing but consistent with the findings of appeals court above.District Court totally disregarded this reversal and what it actually said, using its biased instruction to circumvent the facts and meaning of the reversal and

completely fails to make a finding on land appraisal. The ultimate findings of District Court reverses Appeals Court 1983 and awards no payment as directed by reversal. Its finding and instruction is totally inconsistent with reversal and its order on remand.

Appeals Court affirms but it only addresses two issues and those under false instructions and in so doing reverses the finding of fact and refuses to enforce the requirements of the previous court of appeals, there by reversing itself. Four issues on appeal were never addressed, the all important issue of instruction, biased or incompetent Commissioners, Biased Judge, the issue of land appraisal clearly reversed by appeals (1983) and not addressed by District Court, and the issue of eroded land. This clearly violates Due Process and just compensation.

There can be no order in the Courts if the opinion of the Court above carries no weight with the court below. District Court shows a high disregard for Perrys constitutional rights of just compensation and Due Process and for any authority from the Court of appeals. It grants no relief and uses instruction to circumvent reversal, and this is condoned by 1986 Court of Appeals.

There is nothing logical or fair about the outcome of the case and the result is clearly wrong. The issue of instruction on remand must be addressed.

Perry has been denied use of this property for 8 years because of the cost of building more than a mile of access roads and purchase of right of way from others. There is nothing just about the compensation for this property taken.

The entire award for $14,350.00 will not pay for regaining access alone. The property was split by water after the taking, leaving one section of property land locked with no access and no compensation for taking that access road.

The main body of the property can no longer be reached by road as before, because Alabama Power only paid a fraction of the value for a replacement road by falsifying its testimony of both the length and cost per foot of a new road. No compensation at all for 15,000 feet of fence, no compensation for the entire riparian rights and water supply, no compensation for minerals, about half payment for raw land and timber because of use of faulty maps, false testimony, faulty instruction and bias. Miles of remaining fences have wasted and an on going Cattle Ranch business was destroyed with no compensation. This was little more than legalized larceny. The appeals court in affirming and refusing to properly address the issues has denied the Constitutional rights to own property, to receive just compensation in eminent domain proceedings, to receive due process and to receive a Jury Trial. It is clearly wrong.

United States v. Sowards 370 F 2d 87 (1966) P.89. The Fifth amendment of the United States Constitution provides that private property will not be taken for public use without just compensation. The soverign must place the owner in as good a position pecuniarily as he would have been if his property was not taken.

Appeals Court and District Court has held that there is no right to a Jury Trial as guaranteed by the United States Constitution. Yet the case is to follow Alabama law according to 1983 reversal. Title 19 section 17 of Alabama law states specifically that on appeal from Commission a Jury Trial is

required and states that the amount of award to be assessed is a question exclusively for the Jury. Mobile, etc., Co. v. Louisville etc., R. Co., 192 Ala. 136, 68 So. (2d) 305; Alabama Power Co. v. Thompson, 250 Ala. 7, 32 So. (2d) 795.

District Court refuses to abide by its own instruction or enforce it, makes conclusionary findings not supported by testimony, makes false statements in its opinion, refuses to recuse himself and allow a fair trial.

Its instruction encourages, speculation, contradiction and false testimony which is accepted and affirmed by 1986 appeals court.

It is therefore respectfully requested that this Honorable Court grant Certiorari in this cause

Respectifully submitted

Robert A. Perry Pro se

Appendix A

ALABAMA POWER CO. v. 1354.02 ACRES OF LAND

ALABAMA POWER COMPANY, a corporation, Plaintiff-Appellee.

v.

1354.02 ACRES, MORE OR LESS, OF LAND IN RANDOLPH COUNTY, ALABAMA, and Gladys Graves, et al., Defendants-Appellants. 709 F.2d 666 (11th Cir.1983)

No. 82-7352
Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

July 11, 1983

Property owner appealed from an order of the United States District Court for the Middle District of Alabama, Robert E. Varner, Chief Judge, awarding damages in eminent domain proceeding. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) trial court's refusal to try the issue of condemnation to a jury, despite property owner's jury demand, was not a violation of property owner's constitutional rights; (2) district court erred in assuming that the commissioners who were appointed to determine compensation took the riparian values into account in assessing the total land value, because the property assessor whose testimony generally was accepted by commissioners did not discuss the value of riparian rights, it was impossible to discern from values assigned the different parcels that riparian rights were taken into account, and district court's instructions to commissioners were not so clear that the commissioners may not have utilized an erroneous legal principle and offset against riparian rights the enhancement to the remaining property; and (3) district court erred in upholding commissioners' determination that all of the land

at issue was assayed, because property owner claimed that there was a discrepancy between the actual property and the map utilized by condemnor to assess the amount of compensation but commissioners declined to hear evidence concerning the validity of the survey maps.

Affirmed in part; reversed in part and remanded.

1. Federal Civil Procedure 2068

In condemnation proceeding, trial court's refusal to try the issue of condemnation to a jury, despite property owner's jury demand, was not a violation of property owner's constitutional rights, because there is no constitutional right to a jury in an eminent domain action. Fed.Rules Civ. Proc.Rule 71A(h), 28 U.S.C.A.

2. Eminent Domain 124,145(1)

In eminent domain proceeding, property owner must receive just compensation for condemned property, without regard to any enhancement of the remaining land: damage to remaining land, however, may be offset by enhancement in the value of that land.

3. Eminent Domain 63,124

Once land containing water and access to that water is condemned, the taking is complete, and enhancement of remaining land may not be set off against the riparian rights.

4. Eminent Domain 238(6), 263

In eminent domain proceeding, district court erred in assuming that commissioners who were appointed to determine compensation took riparian values into account in assessing total land value, because property assessor whose testimony generally was accepted by commissioners did not discuss the value of riparian rights, it was impossible to discern from values assigned the different parcels that riparian rights were taken into account, and district court's

instructions to commissioners were not so clear that the commissioners may not have utilized an erroneous legal principle and offset against riparian rights the enhancement to the remaining property; therefore, cause would be remanded on issue of riparian rights to ensure that property owner was compensated for value of those rights taken.

5. Eminent Domain 186,263

In eminent domain proceeding, district court erred in upholding commissioner's determination that all of the land at issue was assayed, because property owner claimed that there was a discrepancy between the actual property and the map utilized by condemnor to assess the amount of compensation but commissioners declined to hear evidence concerning the validity of the survey maps; cause would be remanded to provide property owner an opportunity to prove that condemnor appraised insufficient acreage.

Appeal from the United States District Court for the Middle District of Alabama.

Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

KRAVITCH, Circuit Judge:

On November 14, 1978, Alabama Power Company filed a complaint in condemnation in the United States District Court for the Middle District Of Alabama pursuant ot 16 U.S.C § 814. After disposing of certain issues on summary judgement the court appointed three commissioners to determine compensation due landowners pursuant to Fed.R.Civ. P. 71 A (h).Appellant's case was joined with the cases of other parcel owners pursuant to Fed.R.Civ.P. 71A(b).The commissioners assessed compensation due appellant at $14,350. Appellant thereupon brought exceptions to the commissioners' report before the district court, said exceptions being heard on August 12,1982. On September 17,1982 the district court entered a memorandum opinion and order confirming the commissioners' report and

setting compensation at $14,450. Perry appeals the district court's order.

Appellant raises seven grounds on appeal. All but the jury trial issue relate to findings of the commissioners, and were raised and resolved before the district court. The jury trial issue was addressed in the order of the district court appointing the commissioners On the issues of compensation for minerals, damages to remaining land, best use a;nd improvements we affirm on the basis of the opinion below. On the basis of the remaining issues, discussed infra, we affirm in part, reverse in part, and remand.

1. Jury Trial

{1} Appellant argues that the district court's refusal to try the issue of condemnation to a jury, despite appellant's jury demand, was a violation of his constitutional rights. The Federal Rules of Civil Procedure specifically provide for the appointment of commissioners in lieu of a jury, however, in condemnation actions in which the district court determines that the ends of justice best would be served by foregoing trial by jury. Fed.R.Civ.P. 71A(h). We have held that rule 71A(h) does not offend the right to trial by jury, there being no constitutional right to a jury in an eminent domain action. United States v. 5.00 Acres of Land, Etc., 673 F.2d 1244 (11the Cir.1982). The court below made appropriate findings that the ends of justice would be served best by appointment of commissioners. Accordingly, this claim is without merit.

2. Compensation for Riparian rights and Damages

Appellant claims in separate counts that he was denied compensation for riparian rights on the land taken, and denied compensation for damages to the remaining property. appellee responds that "[t]he reason the disadvantages caused by the reservoir did not result in monetary award was because they were more than offset by the advantages. The commission...and the District Court... found enhancement to the remainder as a result of the reservoir" The Commission mentioned appellant's claim as to riparian

rights, but made no finding. The district court assumed the riparian rights "must have been" considered in assessing the total value of the land. Because the commissioners may have been laboring under the same erroneous view of the law as that held by appellees, however, this assumption was error.

Compensation for the taking pursuant to 16 U.S.C. §814 is a question of federal law, which is resolved here by reference to Alabama law. See Georgia Power Co. v. Sanders, 617 F.2d 1112 (5th Cir. 1980) (en banc). The Alabama Code clearly states that except in cases involving condemnation for highways or water conservancy projects, enhancement to the remaining land is not to be considered in determining "just compensation" for the land taken. Section 18-1-18, Code of Alabama (1975). That provision has been construed, however, not to preclude consideration of enhancement of the remaining land to offset damage to the remaining land. Town of Eutaw v. Botnick, 150 Ala. 429,43 S. 739 (1907).

[2,3] In other words, there is a distinction made between the land taken and the land remaining. The property owner must receive "just compensation" for condemned property, without regard to any enhancement of the remaining land. Damage to remaining land, however, may be offset by enhancement in the value of that land. Appellant's claims for damages due to interference with watering rights, for example, clearly are damages to remaining property which, under the Town of Eutaw rationale, may be offset by any enhancement. That is not the case, however, with riparian rights. Once the land containing water, and access to that water, is condemned the taking is complete. Those rights are akin to condemned real property. Enhancement, therefore, may not be set off against riparian rights. As riparian rights fall on the "taking" side of the equation, denial of the rights must be compensated.

[4] An appraiser for the Alabama Power Company testified before the Federal Power Commission (now the federal Energy Regulatory Commission) that the Company expected to pay $2.00 per foot for the riparian rights in the relevant condemned area. Appellant apparently introduced that

statement before the commissioners as a statement against the interest of the Alabama Power Company. The district court acknowledged this, but assumed the commissioners took the riparian values into account in assessing the total land value.

This assumption was unwarranted. First, the property assessor whose testimony generally was accepted by the commissioners did not discuss the value of riparian rights. Second, it is impossible to discern from the values assigned different parcels that riparian rights were taken into account. Finally, the instructions of the district court to the commissioners were not so clear that the commissioners may not have utilized the same erroneous legal principle asserted by appellee. Accordingly, we reverse and remand on the issue of riparian rights to ensure that appellant is compensated for the value of those rights taken.

3. The Area Cruised for Timber

[5] Appellant claims the timber cruiser failed to cruise all of appellant's property, with the result that appellant was inadequately compensated for his timber and land. The basis for this allegation is a claimed discrepancy between the actual property and the map utilized by Alabama Power to assess the amount of compensation and guide the cruisers. Further, appellant claims an additional amount of acreage has eroded, or been "pressed down," to below the contour line at which his property commences. The Report of the commissioners does not mention this contention of appellant.

The district court upheld the ultimate finding of the commissioners as to the amount of compensation. As to the two issues concerning acreage (payment for timber and for land) the court acknowledges that there is evidence to support appellant's contention; nevertheless, the court finds the commissioners' determination that all the land was appraised "not clearly erroneous." We disagree.

It appears appellant attempted to raise the validity of the survey maps before the commissioners, but they declined to hear the evidence, finding it outside their jurisdiction. The

timber cruiser and appraiser testified they appraised all the land, as indicated on the maps. It the maps were incorrect, however, their determinations as to the proper amount of compensation would be incorrect as well. As the commissioners demurred to the question of whether Alabama Power's maps were correct, it was incumbent upon the district court to hear appellant's testimony and permit him an opportunity to prove his case. Upholding the determination of the commissioners as "not clearly erroneous" when they failed to provide appellant an opportunity to prove his point was a clear error of law.

The district court, in an argument adopted by appellee before this court, held alternatively that as the total timber value awarded by the commission exceeded that calculated by appellant, there was no harm done appellant. This argument does not satisfy the legal requirement of "just compensation." The amount of money awarded for timber is a product of two variables; acreage and per acre timber value. The commissioners found as a fact that the per acre figures should have been higher than those suggested by appellant. That determination is separate from, and irrelevant to, a determination of the total acreage. if appellant is correct that Alabama Power cruised the wrong number of acres, then appellant is entitled to the correct acreage multiplied by the per acre dollar figure arrived at by the commissioners. We remand therefore, to provide appellant an opportunity to prove that Alabama Power appraised and cruised insufficient acreage, and for whatever adjustments are thereby required.

AFFIRMED IN PART; REVERSED IN PART and REMANDED for further proceedings not inconsistent with this opinion.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

ALABAMA POWER COMPANY,
a corporation

Plaintiff,

v. CIVIL ACTION 78-213-E

1354.02 ACRES, Etc.,et al.,

Defendants.
Filed Jan. 15,1985

JUDGEMENT

In accordance with the opinion entered in the above-styled cause on this date and in accordance with the Report of the Commissioners filed September 26, 1984 as modified by such opinion, it is

ORDERED, ADJUDGED and DECREED by this court that Robert A. Perry and wife, Sarah K. Perry, as owners of interests in the property taken, have and recover of the plaintiff the sum of $14,350.00 together with the interest thereon from the date of the plaintiff's entry into possession of the property until the date of this judgement, as just compensation for the taking of the property involved here.

DONE this the 15th day of January, 1985.

R. E. Varner

United States District Judge

Appendix C
IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA EASTERN DIVISION

ALABAMA POWER COMPANY,
a corporation,

Plaintiff,

v. CIVIL ACTION NO.78-213-E

1354.02 ACRES, Etc., et al.,

Defendants.
Filed Jan. 15, 1985

OPINION

Pursuant to an order of remand from the Eleventh Circuit Court of Appeals dated July 11, 1983, reported as Alabama Power Company v. 1354.02 Acres of Land, 709 F.2d 666 (11th Cir. 1983), this court referred the ascertainment of just compensation to the commission for further proceedings on several points. The matter is now before this Court on objections by both the plaintiff and the defendants to the Commission's report on the order of remand.

Although the facts are set forth in the Commission's first report and this Court's opinion affirming that report, it is

appropriate to briefly outline the aspects of the case relevant to the present proceedings.

On November 14, 1978, Alabama Power Company filed suit in this Court for the condemnation of various tracts of land for its proposed Harris Reservoir. This Court appointed commissioners for a determination of the compensation due the landowners. The commissioners assessed the compensation due at $14,350.00. This Court subsequently entered an order confirming the commission's report, and the defendant appealed. Although the appeal raised a number of issues, the Court of Appeals found merit in only three of the defendant's points and remanded the case to the District Court for further proceedings on those issues. Consistent with that order of remand, this Court remanded the cause to the Commission for consideration of the following:

> 1. In assessing the total value of the land taken, did you consider the value, if any, of riparian rights?
>
> If your answer is "no", please take into consideration such value and report the gross total value of the land taken to the Court. In doing so, you must not offset enhancement to the remaining property against the value of riparian rights, but you may consider it to offset damages, if any, to the remaining land. For instance, it may be

considered to offset damages for interference with rights to water livestock running on the remaining lands.

2. In assessing the total value of the land taken, did you consider and include in your evaluation of land taken whether or not any additional amount of land had eroded or been pressed down below the contour line at which defendant Perry's property commences?

If your answer is "no", please include in your report the value of any such additional land, if any.

3. Did the condemnor's appraisers appraise acreage less than that actually at issue?

If your answer is "no", please include in your report the value of any such additional land, if any.

Pursuant to the Court's order, the Commission reconvened in Opelika, Alabama on the 7th day of August, 1984. The Commission announced an affirmative response to the first question certified by the District Court, and the par;ties were allowed to offer evidence as to the second and third questions. On September 26, 1984, the Commission filed its report, as to which both parties filed written objections. These objections were heard by this Court on January 2, 1985.

This Court has reviewed the transcripts of the proceedings before the Commission and heard oral argument by the

parties with respect to their objections to the Commission's report. In considering the objections, it is necessary to review the legal standards governing review of the report of the Commissioners.

Fed. R. Civ. P. 71A (h) provides that "if a commission is appointed it shall have the powers of a master provided in subdivision (C) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53." Fed. R. Civ. P. 53(e) (2) further provides that:

> In an action to be tried without a jury, the court shall accept the master's finding of fact unless clearly erroneous. Within ten days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

Thus, this Court may set aside a finding of fact by the commission if that finding is "clearly erroneous". United States v. Merz, 376 U.S. 192, 198 (1964); United States v. Certain Lands in the City of Statesboro, 341 F.2d 742, 744 (5th Cir. 1965). As noted by the former fifth Circuit Court of Appeals, "Under the clearly erroneous concept, a finding

is to be set aside when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. Certain Lands in the City of Statesboro, 341 F.2d 742,744 (5th Cir. 1965); see also United States v. Waymire, 202 F.2d 550,553 (10th Cir. 1953). If the District Court determines that the commission's findings were in fact clearly erroneous, Fed. R. Civ. P. 53(e) (2) outlines the options available to correct those findings. Specifically, "it may modify the report on the basis of the record made before the commissioners, or it may reject it in whole or in part or may receive further evidence or may recommit it with instructions". United States v. Merz, 376 U.S. 192, 199-200 (1964); United States v. Hilliard, 412 F.2d 174, 177 (8th Cir. 1969). Applying this concept, the Fifth Circuit Court of Appeals has stated that:

> We do not think the power to modify is to be narrowly construed or applied. The power to modify is a power to alter or change, and to enlarge and add as well as to limit, restrict or reduce. The District Court could have rejected the commission's findings had they been clearly erroneous. Had this been done, the District Court could have substituted its own findings based upon the evidence before the commission.

United States v. Tampa Bay Garden Apartments, Inc., 294 F.2d 598, 603 (5th Cir. 1961). In determining whether or to what extent a report should be modified, the District Court may refer to the transcripts and records compiled by the commission without the necessity of a de novo hearing or similar compilation of additional evidence. Merz, 376 U.S. at 200; United States V. 1,162.65 Acres of Land, 498 F. 2d 1298, 1302 (8th Cir. 1974); Tampa Bay Garden Apartments, Inc., 294 F.2d at 603.

The principles outlined above have no application, however, in the context of a court's review of a commission's application of the law to the facts. Thus, where a commission applies an incorrect legal standard, its findings are not protected by the "clearly erroneous" standard applicable to findings of fact. Fogel v. Chestnut, 668 F.2d 100, 116-17 (2nd Cir. 1981); United States v. 620.98 Acres of Land, 255 F. Supp. 427, 431 (D. C. Ark. 1966); See, Generally, 5A J. Moore, Moore's Federal Practice ¶53.12 [Second Edition 1984]; 9 C. Wright and A. Miller, Federal Practice and Procedure, § 2614 (1971). As noted by one commentator, "the master's conclusions of

law... carry no weight with the court." 9 Wright and Miller, supra, at § 2614.

Guided by these principles, this Court makes the following findings with regard to the questions certified to the Commission:

1. Riparian Rights. In its first opinion, this Court stated that whatever loss the claimant may have suffered with regard to riparian rights was not independent of the value of the land, and therefore must have been considered by the commissioners in their appraisal of the land. The Eleventh Circuit Court of Appeals found fault in this view and remanded consideration of that issue to this Court. This Court in turn certified the question of riparian rights to the Commission. In its Report On Order of Remand, the commission confirmed that it had considered all of the elements of the value of the land taken in the first hearing, including any riparian rights. Further, the Commission requested the appraiser for Alabama Power Company, Mr. Moss, to state whether his earlier testimony on the value of the land taken had considered riparian rights. Mr. Moss testified that he had considered the riparian rights in valuing

the property to be taken. consequently, the Commission unanimously concluded that its previous valuation of the condemned property included consideration of the value of the riparian rights associated therewith. Upon review of the transcripts of both hearings, this court finds nothing in the record to indicate that the Commissioners' finding is clearly erroneous. To the contrary, this Court believes that the great weight of the evidence supports the conclusion that the Commission considered the value of riparian rights in its earlier findings.

11.Change of Contours. The Court of Appeals also remanded for consideration of a contention by the defendant that a portion of the property had been pressed down below the 790 contour line, so that more property was taken than was described in the complaint. The Commission did not address this issue in its first report. At the August 7, 1984 hearing, however, the Commission allowed the parties to offer evidence bearing on this question.

The property in issue is an island formed by the 790 foot contour that Mr. Perry contends had once been connected to

the land described in the complaint by a 180-foot isthmus. Mr Perry testified that his family had exercised ownership over this parcel of property and that from time to time he had removed storm damaged timber from it. He contended that the elevation of the isthmus had been lowered below the 790 contour by logging operations and other activities, which in turn separated the island from the rest of his property because the property line is the 790 contour at this location.

Mr. Perry's surveyor testified that, according to a survey done by him on October 10, 1983, the 790 contour surrounded the island as shown on a survey drawing which was received as evidence. He also stated that he had observed blazes on the trees surrounding the island as well as along the 790 contour on the main body of the Perry land on a visit to the property in 1976. He expressed the opinion that in 1976 the 790 contour extended to form a strip connecting the island to the Perry Property described in the complaint. However, during the 1976 visit the witness testified that he had observed no blazes along the claimed isthmus leading from the main body of land to the island. Moreover, he admitted on cross-examination that his belief

as to the location in 1976 of the 790 foot elevation between the Perry land and the island was formed without having done a survey of the 790 elevation.

Plaintiff called as a witness Mr. Billy McCollough, a forester for Alabama Power Company, who testified that he was familiar with the area and had marked the 790 contour on this property on at least two prior occasions. Mr. McCollough testified that, to the best of his knowledge, there had never been an isthmus or land bridge between the main body of the Perry property and the island. Plaintiff also produced a 1967 contract for the sale of timber in this area, showing as Alabama Power Company land the island and the so-called isthmus. Plaintiff also introduced its deed dated February 20, 1929, by which it had obtained title to all property below the 790 contour as well as islands created by the 790 contour.

Noting that Mr. Perry's theory that the contour had been lowered along a 186-foot strip was unlikely, the Commission concluded that he had failed to prove ownership of the area encompassing the island and the so-called isthmus. Consequently, the Commission determined

there was no justification for any award to the defendant for that property.

This Court concludes that this finding by the Commission is well-supported by the evidence and is not clearly erroneous.

111. Appraisal of Acreage Less Than That actually At Issue.

In its opinion remanding this matter for further consideration, the Eleventh Circuit Court of appeals instructed this Court to provide Mr. Perry an opportunity to prove that the plaintiff cruised the timber on less than all of the condemned land. At the August 7, 1984 hearing, the Commission allowed both parties to offer evidence bearing on this question.

The controversy concerning this item arose out of map revisions dated in August, 1978 , reflecting a change in the property line in one area from contour 790 to the center line of Wedowee Creek. This revision increased the acreage taken from 9.76 acres to 15.71 acres. The plaintiff's cruise of the timber, however, was made on July 25 and 26, 1978. Mr Perry contends that, without the benefit of the revised

maps, the plaintiff's cruise of the area must have been incomplete.

Mr. Moss, the Plaintiff's appraiser, stated that the property line issue was brought to his attention by Mr. Perry in 1976. The dispute was later resolved, and the plaintiff conceded that Mr. Perry had title to the additional property. Mr. Moss testified that although the maps had not been revised as of July 25 and 26, 1978, he was aware of the acreage change occasioned by the property line alteration at that time and that he informed the timber cruiser, Mr. John White, of the change, Mr. Moss also testified that he accompanied Mr. White to the tract and advised him as to the proper area to be cruised.

Mr. John White cruised the timber for Alabama Power Company in July of 1978. He had no specific recollection as to what he had cruised or whether Mr. Moss accompanied him to the property. However, he stated that his working map did not have the Perry property outlined and that, therefore, he had not located the land himself and Mr. Moss must have accompanied him. Both Mr. Moss and Mr. White testified to their routine practice during the summer and fall

of 1978 as to review of each map revision to determine the need for changes in timber cruises and appraisals. No such changes were deemed necessary for this property.

On a per acre basis assuming a cruise of the entire 15.71 acres, Mr. White's assessment of the value of the timber compared favorably with a valuation of the timber per acre between elevations 793 and 800 by Mr. Morris, one of Mr. Perry's witnesses in the earlier hearing. The White cruise and the Morris cruise were the only evidence of value by actual timber count. The Commission also received testimony that the additional land under consideration consisted of bluff land, pastureland, creekbed and timber production land.

In his closing argument, the defendant raised contentions as to measurements and estimations of the eastern boundary of the property by Mr. Ray Edwards, the surveyor who had testified earlier regarding the alleged isthmus in the western part. Mr. Edwards did not testify concerning these measurements. Similarly,although Mr. Perry contended that Mr. Edwards had made a sketch of the area, no sketch was introduced and Mr. Perry conceded that the sketch was not a

survey of the area. No ties had been made to establish corners, and points of reference were elevations that were estimated because they were under water.

Based on this evidence, the Commission unanimously determined that the defendants were not entitled to an award for additional land on the eastern boundary not included within the plaintiff's original survey. This Court believes this conclusion is well supported by the evidence and not erroneous. Moreover, the point was not one of the subjects of the remand by the Court of Appeals.

With regard to the claim for additional compensation for timber not included within the previous award, the majority of the Commission awarded the claimant additional compensation, although one Commissioner dissented. Specifically, the majority found that "enough doubt exists from the evidence that an additional award of $2,653.83 is due the defendant for timber which probably was not included in the previous award." The third commissioner, however, determined that the preponderance of the evidence indicated that all of the timber was included within the original award.

For the reasons outlined below, this Court is compelled to modify the Commission's finding on this item and to overturn the award of additional compensation for timber.

As noted above, the Commission's conclusions of law carry no weight with the District Court. See Fogel v. Chestnut, 668 F.2d 100, 116 (2nd Cir. 1981); See generally 5A J. Moore, Moore's Federal Practice, ¶53.12[5] (1984). On item 111, two of the commissioners applied an incorrect legal standard both as to the burden of proof and the placement of that burden. Their finding was that "enough doubt exists from the evidence that an additional award ... is due the defendant for timber..." This represents a clear misapplication and misstatement of the correct legal standard with regard to the burden of proof. As this Court instructed the Commission, the landowner bears the burden of proving his damages and the compensation to which he is entitled by a preponderance of the evidence. E.g., United States v. Smith, 355 F.2d 807, 809 (5th Cir. 1966); Morgan v. United States, 356 F. 2d 17, 20, (8th Cir. 1966); United States v. Certain Land Located at 400 Lee Street, Montgomery, Alabama, 214 F. Supp. 148, 150-51 (M. D.

Ala. 1963). On Item No. 111, however, the majority of the Commission employed a standard of reasonable doubt rather than the required preponderance standard. Moreover, the standard employed by the majority apparently misplaced the burden of proof on this issue in requiring the plaintiff to erase any doubt that the additional timber was included in the previous award. The dissenting Commissioner correctly imposed the burden of proof on the landowner and applied the proper preponderance standard. In light of this misapplication of the law to these facts, this Court is compelled to modify the Commission's findings. The Court concludes that Commissioner Pinkston applied the proper legal standard to the facts as recited in the Commission's Report and reached the correct result in this case.

Even if the majority of the commission had made the additional award for timber based on a preponderance of the evidence standard, this Court would conclude that its findings were clearly erroneous and thus subject to modification under Fed. R. Civ. P. 53 (e) (2). As Commissioner Pinkston noted, "the preponderance of the evidence was to the effect that all of the timber was included

in the original award." Mr. Perry's only evidence that Mr. White did not cruise all of the timber was that the map had not been revised as of the date of Mr. White's cruise. The plaintiff, however, produced persuasive evidence that Mr. White was aware of the correct area to be cruised at the time he appraised the timber and that he thus conducted a complete appraisal of the timber. This conclusion is supported by a comparison among the per acre timber values produced by the original commission report, Mr. White's cruise as attributed to the entire 15.71 acres and the cruise performed by Mr. Perry's expert, Mr. Morris. The great weight of the evidence leads to the conclusion that Mr. White included the value of the additional timber in his original cruise, and that the original commission report included compensation for all timber taken.

This Court is convinced that the majority of the Commission committed a mistake in awarding Mr. Perry additional compensation for timber. As a result, this Court will modify the Commission's finding on Item No. 111 and overturn the Commission's award of additional compensation. Fed. R. Civ. P. 53(e) (2); United States v.

Merz, 376 U.S. 192, 199-200 (1964); United States v. Certain Lands in the City of Statesboro, 341 F. 2d 742, 744 (5th Cir. 1965).

Judgement will be entered in accordance with the Report of the Commissioners with regard to Item Nos. 1 and 11 as well as the question raised regarding the eastern boundary. With regard to Item No. 111, the Court modifies the Commission's report to conform with this opinion. Consequently, this court denies any additional compensation for timber condemned by the plaintiff.

Done this the 15th day of January, 1985.

R.E. Varner

United Stated District Judge

Appendix D

IN THE UNITED STATES COURT OF APPEALS FOR

THE ELEVENTH CIRCUIT

NO. 85-7146

ALABAMA POWER COMPANY,

Plaintiff-Appellee,

versus

1354.02 ACRES,MORE OR LESS, OF LAND IN RANDOLPH COUNTY, ALABAMA, AND GLADES GRAVES, et al,

Defendant-Appellant.

ROBERT A. PERRY,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Alabama

(May 30, 1986)

Before RONEY AND HATCHETT, Circuit Judges, and NICHOLS*, Senior Circuit Judge.

PER CURIAM;

The appeal in this condemnation suit simply questions whether there is sufficient evidence to support the district court's determination that appellant property owner was adequately compensated for riparian rights and timber on the condemned land. We affirm.

This is the second time this case has been before this Court. On November 14, 1978, Alabama Power Company filed a condemnation complaint in the United States District Court for the Middle District of Alabama. The District Court appointed commissioners to determine compensation due the affected owners. The commissioners determined that appellant, Perry, was due $14,350. Perry took exception to the commissioners' determination.

The district court, in a memorandum opinion and order dated September 17, 1982, affirmed the commissioners' compensation award. On appeal, this Court affirmed in part, and remanded for a determination of whether Perry had been

adequately compensated for riparian rights and whether the Power Company had cruised the correct acreage of timber. Alabama Power Company v. 1354.02 Acres of Land, 709 F.2d 666 (11th Cir. 1983).

Pursuant to this Court's order, the district court reconvened the commissioners. They determined that while Perry had been adequately compensated for riparian rights, he had been inadequately compensated for his timber. Therefore, the commissioners made and additional award. The district court adopted the commissioners' determination on the issue of riparian rights, but reversed the Commissioners determination that Perry had not been adequately compensated for his timber.

The first question is whether the district court's finding that Perry was justly compensated for riparian rights is clearly erroneous. In our earlier decision, this Court noted that the district court assumed that Perry "must have been paid" for riparian rights because the commissioners mentioned Perry's claim to such rights. The commissioners, however, made no express finding as to compensation for riparian rights. We remanded for a clear determination on the issue. In their

second report, the commissioners stated they had considered "all elements of the value of the land taken in the first hearing, including any riparian rights." The appraiser for Alabama Power Company, Mr. R.E. Moss, testified that he had considered the riparian rights in valuing Perry's property. The district court then determined that the great weight of the evidence supported the conclusion that the amount previously awarded conpensated Perry for riparian rights. The conclusion is not clearly erroneous. As a matter of law, an award of just compensation is not required to include a separate item for riparian rights if, as here, such rights are taken into account with other elements making up the fair market value of the property taken.

Second, Perry contends he was not compensated for the correct acreage of timber on his property. This issue arose out of map revisions dated in August 1978, reflecting a change in the property line in one area from contour 790 to the center line of Wedowee Creek. This revision increased the acreage taken from 9.76 acres to 15.71 acres. The Power Company's cruise of the timber, however, was made on July 25 and 26, 1978. Perry alleges that because the

appraiser did not have the revised August maps when the cruise was made in July, the cruise of the area must have been incomplete.

The commissioners found that Perry was due additional compensation, but the district court overturned this award. The district court held the commissioners applied incorrect legal standards as to the burden of proof. The district court correctly held that the landowner bears the burden of proving his damages and the compensation to which he is entitled by a Preponderance of the evidence. E.g., United States v. Smith, 355 F 2d 807, 809 (5th Cir. 1966); United States v. Certain Land Located at 400 Lee Street, Montgomery, Alabama, 214 f. Supp. 148, 150-51 (M.D. Ala. 1963). Applying the correct standard, the district court held that Perry failed to carry his burden on the timber argument. Perry's evidence consisted solely of the fact that the map had not been revised as of the date of the Power Company's cruise. The Power Company's appraiser, however, testified that he was aware of the incorrectness of the map and conveyed this knowledge to the timber cruiser, and as a result, the appraisal included the area in dispute. This

testimony, the district court noted, is supported by a comparison among the "per acre" timber values produced by the original commissioners' report and the cruise performed by Mr. Perry's expert. The district court's finding upon which it based a modification of the commissioners' determination was not clearly erroneous.

AFFIRMED.

HATCHET, Circuit Judge, dissenting:

In the previous opinion in this case, we held:

> An appraiser for the Alabama Power Company testified before the Federal Power Commission (now the Federal Energy Regulatory Commission) that the Company expected to pay $2.00 per foot for riparian rights in the relevant condemned area. Appellant apparently introduced that statement before the commissioners as a statement against the interest of the Alabama Power Company. The district court acknowledged this, but assumed the commissioners took riparian values into account in assessing the total land value.
>
> This assumption was unwarranted. First, the property assessor whose testimony generally was accepted by the commissioners did not discuss the value of riparian rights. Second, it is impossible to discern from the values assigned different parcels that riparian rights were taken into account. Finally, the instructions of the district court to the

commissioners were not so clear that the commissioners may not have utilized the same erroneous legal principle asserted by the appellee. Accordingly, we reverse and remand on the issue of riparian rights to ensure that appellant is compensated for the value of those rights taken.

709 F.2d 668. In spite of these clear directions, Alabama Power Company has failed to disclose and the district court has failed to make findings regarding the value to be assigned riparian rights.

Although nothing in the record has changed, the majority here dismisses the riparian rights claim by stating: "The great weight of the evidence supported the conclusion that the amount previously awarded compensated Perry for his riparian rights."

Slip Op. at____. As a practical matter, our remand afforded this appellant no hearing on the issue framed by his appeal, no explanations as the why the issue is not addressed as directed, and no relief.

I would again remand the case to the district court with instructions to have Alabama Power Company disclose and the district court make a finding of the value assigned to riparian rights.

Appendix E

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT
50 Spring Street. S.W.
Atlanta. Georgia 30303-3147

July 29, 1986

Miguel J. Cortez
Clerk (Rev.10/84)

TO ALL PARTIES LISTED BELOW:

No. 85-7146 - ALABAMA POWER COMPANY v. 1354.02 ACRES, etc., et al. (ROBERT A. PERRY, Appellant)

(DC # 78 - 213 - E)

This is to advise that an order has this day been entered denying the petition ( ) for rehearing.

_____ The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the petition ( ) for rehearing en banc has also been denied.

__XX__ No member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

Appellate Procedure, Eleventh Circuit Rule 26), the petition ( ) for rehearing en banc has also been denied.

See Rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Sincerely,

Miguel J. Cortez, Clerk

By: Henrietta Barnes

Deputy Clerk

cc: Mr. Robert A. Perry, Pro Se

Edward S. Allen, Esquire

Appendix F

IN THE UNITED STATES COURT OF APPEALS FOR

THE ELEVENTH CIRCUIT

NO. 85 - 7146

ALABAMA POWER COMPANY, Plaintiff-Appellee,

versus

1353.02 ACRES, MORE OR LESS,
OF LAND IN RANDOLPH COUNTY,
ALABAMA and GLADYS GRAVES Defendants,

ROBERT A. PERRY, Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Alabama

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(OPINION May 30, 11 Cir., 1986, ____ F.2d__).
(July 29, 1986)

Before RONEY AND HATCHETT, Circuit Judges, and Nichols*, Senior Circuit Judge.
PER CURIAM:

(x) The petition for rehearing is DENIED and no member of this panel nor other Judge in regular active service on the court having requested that the Court be polled on rehearing

en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

PAUL H. RONEY
United States Circuit Judge
*Honorable Philip Nichols, Jr., Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.